No. 75-67

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

VANIS RAY ROBBINS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After we filed our petition, the United States Court of Appeals for the Fifth Circuit decided *United States* v. *Kehoe*, 516 F.2d 78, which strongly supports the position we have taken and conflicts in principle with the decision of the court below. *Kehoe* addressed the second question reserved in *Serfass* v. *United States*, 420 U.S. 377, 394: whether the government can appeal from a mid-trial order dismissing an indictment when "'a defendant who is af-

forded an opportunity to obtain a determination of a legal defense prior to trial * * * nevertheless knowingly allows himself to be placed in jeopardy before raising the defense.'" *Kehoe* held that the government can appeal and, when appropriate, can retry the accused.

The defendants in *Kehoe* were indicted for embezzlement of land from a federally-insured savings institution, in violation of 18 U.S.C. 657. After the prosecution had rested at trial, the defendants moved for a judgment of acquittal on the ground that Section 657 does not prohibit the embezzlement of land. The district court accepted their argument and, taking the case from the jury, entered a "judgment of acquittal." Another grand jury then indicted the defendants for making a false report with intent to defraud a federally-insured savings institution, in violation of 18 U.S.C. 1006. This indictment was based on the same transactions that had been the subject of the previous indictment and trial; the district court dismissed this indictment, holding that to try the defendants under it would subject them to a prohibited additional jeopardy.

The court of appeals first concluded that the district court's order was neither a verdict nor a judgment of "acquittal" but was, instead, an order dismissing an indictment. The court's reasoning (516 F.2d at 82) was similar to the approach of our petition (Pet. 11-14): when a district court enters an order based "only on the legal sufficiency of the indictment" and takes the case away from the jury

without allowing the fact-finder to resolve any disputed facts, the court has dismissed the indictment, not "acquitted" the defendants.[1] A mid-trial order of dismissal, *Kehoe* held, should be assessed by the same standards that are applied when a court declares a mistrial after jeopardy has attached. "[T]he interest-balancing approach employed in [*Illinois* v. *Somerville*, 410 U.S. 458] is also appropriate in this [case]." *Kehoe*, *supra*, 516 F.2d at 85; footnote omitted. This holding, too, tracks the approach of our petition (see Pet. 8-10, 14-16).

Applying the balancing approach used in the mistrial cases, the *Kehoe* court held that defendants could be retried. Although they had been subjected to part of a trial, that trial had not placed them in danger of conviction because the jury, the only body authorized to render a verdict of guilty, never had an opportunity to do so. Nor had any questions of fact been resolved. The trial terminated at defend-

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[1] The inquiry into the proper characterization of the termination of the first trial in *Kehoe* was particularly appropriate because the government had not appealed the "judgment of acquittal," but had instead brought a new indictment. If the judgment in the first trial had been conclusive on the merits, the new indictment might have been barred by traditional principles of *res judicata* even if not barred by the Double Jeopardy Clause. See *United States* v. *Oppenheimer*, 242 U.S. 85. By concluding that the action at the first trial went only to the validity of the indictment and did not reach the merits, the court of appeals eliminated that objection to trial under the new indictment. The instant case entails no comparable obstacle, for a direct appeal was taken under 18 U.S.C. 3731; *res judicata* could not bar further proceedings because the district court's judgment has not become final.

ants' request, and in the way they sought. And, the court of appeals held (516 F.2d at 86), when defendants deliberately wait until jeopardy has attached before seeking to dismiss the indictment, they cannot object to being tried again if that is necessary to produce a single fair trial.

Kehoe does not squarely conflict with the decision below, for the instant case is not one in which respondent deliberately postponed making a motion to dismiss the indictment. But the approach of *Kehoe* conflicts with the approach of the court below, for *Kehoe* has held that, when an indictment is dismissed in mid-trial at the behest of the accused, the government can subject the accused to another trial if the interests of justice require. Whether the accused has deliberately delayed making his motion is simply one factor to be considered as part of a balancing analysis. The court below adopted a *per se* approach in the instant case, holding that an accused in respondent's position (or the position of the defendants in *Kehoe*) cannot be retried under any circumstances. We submit that, under the balancing approach of *Kehoe* and this Court's mistrial cases, the Double Jeopardy Clause does not prohibit a second trial of respondent.

Because of this conflict in principle among the circuits, in addition to the reasons stated in the petition, the petition for a writ of certiorari should be granted.[2]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

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[2] We draw to the attention of the Court two other recent cases that, applying *Serfass, supra, United States* v. *Wilson*, 420 U.S. 332, and *United States* v. *Jenkins*, 420 U.S. 358, [redacted], have permitted government appeals in criminal cases. In *United States* v. *DeGarces*, C.A. 2, No. 75-1013, decided June 13, 1975, the jury had returned a verdict of guilty, but the district court entered a judgment of acquittal, holding that the evidence was insufficient. The court of appeals reversed and ordered the district court to enter a judgment of conviction. In *D'Allesandro* v. *United States*, 517 F.2d 429 (C.A. 2), D'Allesandro moved to withdraw his plea of guilty. The district court erroneously allowed him to do so, accepted a new plea, and entered a new sentence. The court of appeals reversed and ordered the district court to reinstate the old plea and sentence, citing *Wilson* and *Jenkins*. But see *United States* v. *Spinella*, 506 F.2d 426 (C.A. 5), rehearing denied, 515 F.2d 510 (C.A. 5), petition for a writ of certiorari pending, No. 75-226.

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